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CASE NO. 90-102

In the Supreme Court of the United States

October Term, 1989

LIBERTY COUNTY, FLORIDA, ET AL.,
AND
LIBERTY COUNTY SCHOOL BOARD, ET AL.,
Petitioners,

vs.

GREGORY SOLOMON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals acted properly in remanding this vote dilution case brought under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, to the District Court for further proceedings.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. THIS CASE IS NOT RIPE FOR THE ISSUANCE OF A WRIT OF CERTIORARI BECAUSE IT HAS BEEN REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS

The Eleventh Court of Appeals has remanded this case to the District Court for further proceedings (A 3). No judgment exists either for the Plaintiffs or the Defendants. The record may well be expanded upon remand to the District Court. The additional proceedings could obviate any necessity for Supreme Court review that may otherwise exist. At this time, therefore, the case is not ripe for the issuance of writ of certiorari. *See, Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ (of certiorari) is not issued until final decree").

2. THERE EXIST NO SPECIAL OR IMPORTANT REASONS AS CONTEMPLATED BY RULE 10 OF THE RULES OF THIS COURT FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The petitioners demonstrate no conflict between the court below and any other federal court of appeals or any state supreme court.

Similarly, the petitioners point to no conflict between the court below and the governing decisions of this Court, except to intimate that Judge Kravitch's concurring opinion in the Eleventh Circuit departs from *Thornburg v. Gingles*, 478 U.S. 30 (1986). To the extent Judge Kravitch's concurrence states that a Section 2 violation is established by proving the three *Gingles* factors, her opinion comports with this Court's statement in *Gingles* that most of the other Section 2 evidentiary factors "are supportive of, but *not essential* to, a minority voter's claim." *Id.* at 48 n. 15 (emphasis in original). Moreover, Judge Kravitch's opinion explicitly evaluates the totality of the circumstances (A 29 n.3) and therefore cannot be construed as contrary to this Court's decision in *Gingles*.

Also, the petitioners have not identified any important and unresolved questions of federal law requiring this Court's exercise of its certiorari jurisdiction. Certainly, the petitioners are incorrect when they state that the conflict between Judge Kravitch's opinion and Judge Tjoflat's opinion involves a question requiring certiorari at this juncture of the proceedings. Judge Kravitch's opinion suggests that proof of the three *Gingles* factors is sufficient to prove a violation of Section 2, but also explicitly notes the importance of an examination of the totality of the circumstances. Judge Tjoflat's opinion states that proof of the three *Gingles* factors may not always be enough to prove a violation and that the totality of the circumstances must be analyzed where defendants offer rebuttal evidence regarding those circumstances. To the extent there is a conflict between the opinions of Judge

Kravitch and Judge Tjoflat, the resolution of that conflict likely would make little difference in the outcome of this particular case, and little difference in the outcome of other cases brought under Section 2 of the Voting Rights Act.

With respect to this particular case, Judge Kravitch's analysis does not hinge entirely on the three *Gingles* factors, but goes further and embraces the totality of the circumstances:

> [P]laintiffs in this case also adduced strong evidence establishing the other supportive factors. On the totality of the evidence in the instant record, plaintiffs have clearly established their claim.

(A 29 n.3). Thus, her view on the overall outcome of the case is no different whether she focuses only on the three *Gingles* factors, or on the entire totality of the circumstances. Moreover, Judge Tjoflat's opinion holds that the plaintiffs have proven the three *Gingles* factors, and while he concludes the case should be remanded, his opinion certainly leaves open the possibility that he ultimately will agree with Judge Kravitch's opinion as to who should win and who should lose (A 107-108). Therefore, the resolution of whatever conflict exists in the Eleventh Circuit likely will make no difference in the outcome of this case.[1]

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[1] If it is going to make a difference, that can only be determined after the case is remanded to the District Court and allowed to run its course.

Similarly, resolution of the conflict between the Kravitch and Tjoflat concurrences will be of little consequence to other cases brought under Section 2. In most cases in which plaintiffs can prove the three *Gingles* factors, they also are able to demonstrate a violation under the totality of the circumstances. *See, e.g., Thornburg v. Ginlges*, 478 U.S. at 80; *Smith v. Clinton*, 687 F.Supp. 1310, 1317-1318 (E.D. Ark.), *aff'd* 109 S.Ct. 548 (1988). Petitioners have pointed to no case, and plaintiffs are aware of none, in which the outcome would have been different under the Tjoflat analysis from the outcome under the Kravitch analysis. Until such a case arises, there is no need to grant certiorari on this issue.

The petitioners also claim that certiorari should be granted to clarify "how small a minority may be entitled to a remedy for alleged vote dilution." (Petition at 13). That is not a sufficiently important question of federal law requiring certiorari, and is not an issue raised either by the Kravitch or the Tjoflat opinions in the Court of Appeals. Indeed, all ten judges of the *en banc* Eleventh Circuit agree that the plaintiffs in this case satisfy the requirement of *Thornburg v. Gingles* that the minority population be sufficiently large and geographically compact to constitute a majority in a single-member district (A 19-21, 107-108). With respect to the overall minority percentage in the original at-large jurisdiction, the level necessary to prevail in a Section 2 case may depend upon several factors, including the number of

seats available and the geographic location of the minority citizen.[2] *Gingles* takes those factors into account, and there is no need to grant certiorari to clarify *Gingles* and establish some overall percentage figure that is divorced from the other relevant circumstances in the case.[3]

In sum, this case raises no issues of broad application and importance sufficient to justify the writ of certiorari.

3. CERTIORARI SHOULD NOT BE GRANTED SIMPLY TO REVIEW THE EN BANC COURT'S UNANIMOUS CONCLUSION THAT THE PLAINTIFFS HAVE PROVEN THE THREE GINGLES FACTORS

The judges of the Eleventh Circuit agreed unanimously that the plaintiffs have proven the three *Gingles* factors. Certiorari should not be granted to re-examine the Eleventh Circuit's conclusion regarding these factors in this particular case.

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[2]Consequently, an 11% Black population as in Liberty County, Florida, which is sufficiently geographically compact will satisfy the *Gingles* requirement, where a 40% black population which is "spread evenly through a multimember district," *Gingles, supra*, 478 U.S. at 50, n. 15, may not, since those minority citizens may not be able to point to the at-large structure for the defeat of the minority supported candidates.

[3]The petitioners raise the spectre of a federal court requiring the creation of additional seats to accommodate a relatively small minority group. (Petition at 18). That type of relief has not been ordered in the present case, and therefore is not an issue susceptible of review here.

Petitioners make two specific contentions regarding the facts. First, they state that no evidence demonstrates the ability to create a majority black voting age population single-member district. (Petition at 29-30). However, as the petitioners concede (*Id.*) and as Judge Tjoflat's panel opinion confirms (A 201 n.10), this evidence was uncontested in the district Court. It is too late for the petitioners to attempt to contest it here. Second, the petitioners assert that no evidence was present of white voting patterns (Petition at 35). That is wrong. As the various appellate opinions indicate, abundant evidence of legally significant white bloc voting is in the record (A 24-26, 33-34 n. 8, 108, 180-181). These are not the sort of matters upon which certiorari should issue.

In addition, the petitioners complain that not enough elections were analyzed, particularly elections involving only white candidates (Petition at 37-38). However, plaintiffs presented evidence of voting patterns in sixteen separate elections (A 35-38 n. 9), some of which involved only white candidates. Moreover, the defendants at trial presented no countervailing evidence of voting patterns in any elections, whether with white candidates only or white candidates against black candidates. The evaluation of mostly black-white elections, with some white-white elections, is more than sufficient to establish a *prima facie* case of polarized voting, and is supported by a number of decisions finding polarized voting on the basis of only black-white elections. *See, Thornburg v. Gingles*, 478 U.S. at 57 n. 25; *Smith v. Clinton*, 678 F.Supp. 1310, 1317-1318 (E.D. Ark.), *aff'd*, 109 S.Ct. 548 (1988); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th

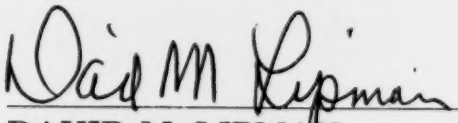
Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989).

These factual assertions of the petitioners do not merit the grant of a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari, styled as is this certificate, has been served upon the persons listed below, the only persons required to be served, by United States mail, first class postage prepaid, on this 24th day of August, 1990:

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